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Nos. 94-923, 94-924

In the Supreme Court of the United States
October Term, 1994

Ruth O. Shaw, et al.,
Appellants,
v.
James B. Hunt, Jr., as Governor of the State of North Carolina, et al.,
Appellees.

James Arthur Pope, et al.,
Appellants,
v.
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On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of North Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS, RUTH O. SHAW, ET AL.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants, Ruth O. Shaw, *et al.* All

parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Hays v. Louisiana*, ___ U.S. ___, 63 U.S.L.W. 4679 (1995), *Adarand v. Pena*, ___ U.S. ___, 132 L. Ed. 2d 158 (1995), *Chisom v. Roemer*, 501 U.S. 380 (1991), and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, should be inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true when congressional districts are gerrymandered on the basis of race.

STATEMENT OF THE CASE

As a result of the 1990 census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. North Carolina's General Assembly enacted a reapportionment plan that included one majority-black

congressional district. After the Attorney General of the United States objected to the plan pursuant to Section 5 of the Voting Rights Act,[1] the Assembly passed new legislation creating a second majority-black district. The resulting race-based configurations, Districts 1 and 12, lacked all inherent integrity, "instead merely patching together islands of voters with only a legislative intent to group predetermined numbers of voters by race." *Shaw v. Hunt*, 861 F. Supp. 408, 490 (E.D.N.C. 1994) (Voorhees, C.J., concurring in part and dissenting in part). "District 1 is somewhat hook shaped [and] ... has been compared to a 'Rorschach ink-blot test,' and a 'bug splattered on a windshield.'" *Shaw v. Reno*, 125 L. Ed. 2d at 521 (internal citations omitted). "District 12 is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.*

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[1] Forty of North Carolina's one hundred counties are covered by § 5 of the Voting Rights Act of 1965, 42 USC § 1973(c), which prohibits a jurisdiction subject to its provisions from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization. ... The jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the Attorney General [of the United States].

Shaw v. Reno, ___ U.S. ___, 125 L. Ed. 2d 511, 520 (1993).

(internal citations omitted). The Attorney General did not object to this revised plan but appellants here, citizens and voters of North Carolina, sued in Federal District Court alleging that the state had created an unconstitutional racial gerrymander.

A three-judge District Court dismissed the complaint against both state and federal defendants. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992). The court rejected the argument that race-based districting is per se unconstitutional and that the reapportionment plan in question was impermissible. It reasoned that because the state's purpose was to comply with the Voting Rights Act, and the plan did not result in proportional underrepresentation of white voters state wide, the voters had failed to state a cognizable equal protection claim. *Id.* at 472-73.

This Court, in an opinion by Justice O'Connor, reversed the lower court's decision and remanded. *Shaw v. Reno,* 125 L. Ed. 2d 511. After setting out legal precedents on voting rights and the history of the Voting Rights Act, the Court noted that it was "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." *Id.* at 525. All governmental classifications by race are subject to strict scrutiny, regardless of the motive, including "legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race.'" *Id.* at 526-27 (internal citation omitted). And bizarre reapportionment plans, according to the Court, fall squarely within this strict scrutiny analysis. *Id.* at 529-30. All other issues or arguments were explicitly reserved and remained open for further consideration. *Id.* at 530, 534-35.

On remand, a majority of the three-judge District Court found that the North Carolina redistricting plan intentionally segregated black citizens into the First and Twelfth Districts, requiring strict scrutiny of the racial gerrymander. *Hunt,* 861 F. Supp. at 473-74. The court, however, found that the

plan served a "compelling interest" by racial gerrymandering --the State "had a 'strong basis in evidence' for concluding that such action was necessary to bring its existing congressional redistricting scheme into compliance with §§ 2 and 5 of the Voting Rights Act."[2] *Id.* at 474. Pursuant to this allegedly compelling interest, the court held that the racial gerrymander was "narrowly tailored" to serve that compelling interest. *Id.* at 475.

In a thoughtful and persuasive separate opinion, Chief Judge Richard L. Voorhees questioned the majority's argument that the plan was (1) narrowly tailored to further (2) a compelling interest. *Id.* at 476-97 (Voorhees, C.J., concurring in part and dissenting in part). Not only had the court been overly selective in choosing operative facts and crabbed in its interpretation of the Supreme Court's opinion in *Shaw v. Reno*, but its "feverish concluding characterization

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[2] "Section 2 of the Voting Rights Act of 1965 provides that '[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.' 42 U.S.C. § 1973(a)." *Holder v. Hall,* 512 U.S. ___, 129 L. Ed. 2d 687, 694 (1994). In a Section 2 vote dilution suit, a court must first determine that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is cohesive, and (3) the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Id.* at 695 n.1. Second, the court must determine "whether the totality of the circumstances supports a finding of liability." *Id.* at 695. Finally, "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Id.* at 695.

of the case" could raise the specter of judicial partiality. *Id.* at 479 n.7.

Ruth O. Shaw, *et al.*, appealed the District Court's decisions. This Court consolidated the appeals and noted probable jurisdiction on June 29, 1995.

SUMMARY OF ARGUMENT

First, the Voting Rights Act unconstitutionally requires racially proportional representation in redistricting. The Act originally was aimed only at discriminatory voting procedures which denied blacks the right to cast their ballots. Although the 1982 amendments to the Act included those procedures which had racially discriminatory "results" (but not necessarily "intent") it explicitly repudiated proportional representation by race. However, the executive and legislative branches of the federal and state governments have interpreted Supreme Court opinions interpreting the Act to require proportional representation. Thus, this Court must clarify its construction of the Act so that other branches of government will not be led to apply the statute and case law in an unconstitutional manner.

Given that proportional representation is unconstitutional and fundamentally opposed to American principles of democratic government, if the Act cannot be interpreted in any way other than to require such proportional representation, the Act itself must be struck down as unconstitutional. Alternatively, legislative and executive actions outside the scope of the Act which require proportional representation must be invalidated as unconstitutional. Mandated proportional representation is equivalent to the strict racial quota systems found by this Court to be abhorrent to the Constitution. It segregates individuals into racial clans, inhibiting the democratic tenets of coalition and compromise. It fosters politicians who represent races rather than

constituents. It prevents broad-based minority power by limiting their influence to a few "majority-minority" districts. And it makes the patently false and pernicious assumption that all minorities think alike and that only a minority can properly represent minority interests.

Second, the Fourteenth Amendment forbids government institutions from redistricting based on race. Historically, American political thought emphasized equality of opportunity, "moral equality," over equality of results, "numerical equality." From the Civil War through the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the enactment of the landmark civil rights legislation in the 1960s, both government and citizen activists agreed that moral equality was the basis for a strong, nondiscriminatory republic. For the past 25 years, however, numerical equality superseded moral equality as the foundation for governmental decision making. This ascendance of numerical equality is contrary to the premises on which America achieved its distinctive greatness.

Allowing states to racially gerrymander revives the invidious doctrine of "separate but equal," fosters separatist beliefs and actions, and renounces the "moral equality" on which our Nation is based. It is per se unconstitutional under the Fourteenth and Fifteenth Amendments and the principles espoused by *Brown* and its progeny. It is tantamount to the immoral and indefensible caste and apartheid systems which have been universally denounced. And there is no legal justification, no compelling interest, for segregating individuals into "racial boroughs."

For the reasons stated below, the Eastern District of North Carolina's decision below should be reversed.

ARGUMENT

I

THE VOTING RIGHTS ACT UNCONSTITUTIONALLY REQUIRES RACIALLY PROPORTIONAL REPRESENTATION IN REDISTRICTING

In 1964, Dr. Martin Luther King proclaimed that "[o]nly with the growth of an enlightened electorate, white and Negro together, can we put a quick end to this century-old stranglehold of a [racist] minority on the nation's legislative processes." M. King, *Why We Can't Wait* 149-50 (1964). Dr. King's words became legislative action less than a year later with the passage of the Voting Rights Act. "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men," proclaimed President Lyndon Johnson upon signing the Act into law. S. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics* 3-4 (1985).

A. Original Intent of the Voting Rights Act

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Board of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). Section 2 of the Act was largely uncontroversial and was seen only as a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980). Pursuant to this constitutional power, the statute was aimed at discriminatory voting procedures which continued to deprive blacks of access to the ballot, such as literacy tests and "grandfather clauses." *Holder v. Hall*, 129 L. Ed. 2d at 703 (Thomas, J., concurring in the judgment). Then Attorney

General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure ... from ordinary concepts of our federal system," *Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its *limited* scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g., City of Mobile*, 446 U.S. at 60-61. Three decades later, "the gradual workings of the original law" have been remarkably successful in meeting its goals: "the enrollment of minority voters, the large-scale entry of minority voters into the rank and file of the political parties, the entry of minority candidates into politics, and a growing receptiveness of a predominantly white electorate to minority candidates." T. O'Rourke, *The Voting Rights Paradox* in *Controversies in Minority Voting* 109 (Grofman & Davidson, eds., 1992) (Paradox); *see also Holder*, 129 L. Ed. 2d at 704 (Thomas, J., concurring in the judgment).

The Act, however, did not and could not reach vote "dilution" and, in particular, racial gerrymandering claims. *Holder*, 129 L. Ed. 2d at 716 (Thomas, J., concurring in the judgment). Drawing district lines must be distinguished from the basic process of allowing a citizen to vote: registering, casting a ballot, and having it counted. *Id.* at 717. This dichotomy reflects the different bases of the different types of claims. As noted, the Act derived from the Fifteenth Amendment, while gerrymandering claims are cognizable only under the Fourteenth Amendment. *See Voinovich v. Quilter*, 507 U.S. ___, 122 L. Ed. 2d 500, 514 (1993); *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980)

(Powell, J., dissenting); *Beer v. United States*, 425 U.S. 130, 142-43 n.14 (1976).

Furthermore, the Act, in its original and amended form, did not call for proportional racial representation. In fact, it explicitly disavowed any such intent: "[N]othing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Members of this Court have recognized this prohibition both before and after the 1982 amendments to the Act. *See, e.g., City of Mobile*, 446 U.S. at 65 (opinion of Justice Potter Stewart for the Court); *Holder*, 129 L. Ed. 2d at 724 (Thomas, J., concurring in the judgment). According to Senator Bob Dole, the key framer in the 1982 amendments, the Act would "[a]bsolutely not" provide any remedy for groups of disgruntled voters if each *individual* was allowed to exercise his franchise. 128 Cong. Rec. 14,133 (1982). Dole viewed the Act as "focused on *access* to the processes surrounding the casting of a ballot, not ... ensuring electoral *outcomes* in accordance with some 'undiluted' norm." *Holder*, 129 L. Ed. 2d at 728 (citing S. Rep. No. 97-417 193-94 (1982)). The Act simply was not intended or expected to create proportional representation by race.

B. Executive and Legislative Branches of Government Have Interpreted and Appled the Act to Require Unconstitutional Racial Representation

The current interpretation of the Voting Rights Act by the Department of Justice and state legislatures, in direct contravention of its legislative language and Supreme Court precedents now calls for proportional racial representation. How did this occur?

> It is a story of amendment through inadvertence, of minor tinkering with large consequences; of change precipitating change; of a skilled civil rights lobby working in a hospitable environment

> and blessed with both an opposition prone to self-inflicted wounds and extraordinary access to the chairman of a House subcommittee; of the slapdash, inattentive habits of Congress; of contradictory Supreme Court decisions; of a D.C. district court with a revisionist vision of the act, consistently asserting the right of racial and ethnic minorities to proportional representation; of the frequent application of a standard close to proportionality in the interpretation of section 2 [of the Act] as well; and of Department of Justice attorneys who invent law as they enforce it.

A. Thernstrom, *Whose Votes Count?* 235-36 (Harvard University Press, 1987) (Thernstrom). Each of these factors has led to the distortion and incoherence of the Act.

First, no fewer than six justices of this Court have recognized that the current interpretation of the Act creates proportional representation. In *Thornburg v. Gingles*, 478 U.S. 30, 97 (1986), Justice O'Connor, joined by Chief Justice Burger, and Justices Rehnquist and Powell stated that through its interpretation, "the Court is requiring a form of proportional representation." *See id.* at 85, 91. In *Holder*, Justice Thomas and Justice Scalia agreed that the Act as interpreted and applied requires proportional racial representation. 129 L. Ed. 2d at 706-09 (Thomas, J., concurring in the judgment). Whether expressly stated by present and former members of the Court or "hidden" within the morass labeled "totality of the circumstances," *see* Thernstrom at 127, the Act as interpreted mandates racial proportionality in elections.

Second, experts and legislators at the time of the 1982 amendments to the Voting Rights Act believed that racial proportionality would result. According to Duke Law Professor Donald Horowitz, "[t]he only way to judge the effect [of a redistricting scheme] will be to see whether

minority voters have representatives in proportion to their population in that jurisdiction." *Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary,* 97th Cong., 2d Sess. 1309 (1982) (Senate Hearings); *see also id.* at 1340 (testimony of Professor James Blumstein). Some congressional witnesses were less methodical in their approach but came to the same conclusion: "South Carolina's population is approximately 30 percent black, and 30 percent of the senate should be black," argued Dr. Willie Gibson, president of the NAACP Conference for South Carolina. *Id.* at 252; *see also id.* at 253 (statement of Jesse Jackson).

Third, the Department of Justice has independently determined that the Act requires proportional representation. For example, a Justice Department memorandum on Barbour County, Alabama, candidly argued that "[s]ince blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts, that is two viable districts plus a third district in which their interests must be taken into account even though they cannot control the election." Thernstrom at 171-72, *see also id.* at 179. This Court recently concluded in *Miller v. Johnson,* ___ U.S. ___, 63 U.S.L.W. 4726, 4728 (June 27, 1995), that the plan adopted by the Georgia state legislature "bore all the signs of [the Justice Department's] involvement," gouging out black populations and connecting them "by the narrowest of land bridges." (Internal citations omitted). The Justice Department demanded race-based revisions to Georgia's redistricting plans, and the state legislature eventually acquiesced. *Id.* at 4731. This Court affirmed the District Court's invalidation of the plan, concluding that "the Justice Department's implicit command [was] that States engage in presumptively unconstitutional race-based districting." *Id.* at 4733. Similarly, here, the interaction between North Carolina legislators and the Department of Justice took

the form of federal commands rather than enlightened discussion.

> [Assistant United States Attorney General for Civil Rights John] Dunne did most of the talking ... and most of it got down to ... a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore you ought to have as close to that as you could have [in] congressional districts. ... [I]f you had 22 percent blacks in North Carolina, then you ought to have 22 percent minority congressional seats. Whatever shape didn't matter.

Hunt, 861 F. Supp. at 484 n.16 (Voorhees, C.J., concurring in part and dissenting in part).

It is no wonder that states seeking to avoid harassment and threats from the Department of Justice have begun to gerrymander electoral districts according to race. *See Holder*, 129 L. Ed. 2d at 710 (Thomas, J., concurring). The result is that the states, the lower courts (*see, e.g., Farr*, 808 F. Supp. at 472-73; *United States v. Dallas County Commission*, 850 F.2d 1433, 1437-42 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989)), and the Department of Justice are all converging on the standard that the Act explicitly refuted--racial proportionality in elected representatives. Justice Kennedy, concurring in *Johnson v. DeGrandy*, 512 U.S. ___, 129 L. Ed. 2d 775, 802 (1994) (Kennedy, J., concurring in part and concurring in the judgment), hypothesized the potential results:

> States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 [of the Act] litigation. Likewise, a court finding a § 2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based

> redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under § 5 of the Act, ... to a State's proposed legislative redistricting.

This possible use and abuse of racial proportionality in redistricting, however, is not hypothetical--it is reality. *See, e.g.*, Thernstrom at 193. The current interpretation and application of the Act, whether by courts, the Department of Justice, or state legislators, is that redistricting must create racial proportionality. This interpretation is unconstitutional.

C. Required Racial Proportionality Is Unconstitutional and Fundamentally Opposed to American Principles of Government

A construction of the Voting Rights Act, which requires racial proportionality in redistricting, is unconstitutional and fundamentally opposed to American principles of democratic government. It is no different than the strict quota systems in governmental hiring and contracting. *See, e.g., Northeastern Florida Contractors v. City of Jacksonville,* ___ U.S. ___, 124 L. Ed. 2d 586, 594-95 (1993) (a strict quota system under a different label is still a quota system); *Regents of University of California v. Bakke,* 438 U.S. 265, 288-89 (1978) (same). Minorities make up X percent of the population, therefore they should have a quota of X percent of the elected representatives--or so the theory goes. Strict racial quotas, however, have been found by this Court to be abhorrent to the Constitution. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 499-508 (1989); *Bakke,* 438 U.S. at 307-11, 315-19; *see also* A. Bickel, *The Morality of Consent* 133 (Yale University Press, 1975). In its effects, however, the racial quota epitomized in proportional redistricting is even more invidious and destructive

of American democracy than strict employment and contracting quotas.

"Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright v. Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting). "[D]emocratic choice and democratic institutions require a fluidity and freedom that are at odds with the concept of labeling citizens for political purposes on the basis of race or ethnicity." Thernstrom at 124.

There are four reasons why racial proportionality in voting districts violates the United States Constitution. First, racially proportional redistricting "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan. ... [T]hat system is at war with the democratic ideal."

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," Senate Hearings at 1449 (statement of Professor William Van Alstyne), obviate the need to form coalitions and seek compromise--two of the most heralded features of American government. "Safe minority districts," like the white gerrymandered districts of the past, obstruct voters or candidates from building bridges between racial groups and from forming voting coalitions that transcend skin color. *Holder*, 129 L. Ed. 2d at 711-12 (Thomas, J., concurring). The Voting Rights Act, "a statute

meant to hasten the waning of racism in American politics," *DeGrandy,* 129 L. Ed. 2d at 796, thus becomes a tool of division rather than integration.

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *Dallas County Commission,* 850 F. 2d at 1444 (Hill, J., concurring). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Senate Hearings at 1327-28 (testimony of Professor Horowitz). *See also Shaw,* 125 L. Ed. 2d at 529.

Third, a state-imposed racial gerrymander assumes that, given a choice, black voters would not choose to exercise broader influence over a number of competitive districts. One of the obvious effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and, consequently, ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pole); D. Bell, *And We*

Are Not Saved: The Elusive Quest for Racial Justice 96 (Basic Books, Inc., N.Y., 1987).

"'I am bitterly opposed to any effort to resegregate me ...,' a black judge in Norfolk, Virginia, testified at a voting rights trial. 'How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community? Political power is not merely symbolic.'" Thernstrom at 244. Without the divisive force of racial reapportionment, politicians have been forced to weld together multiracial coalitions. Democrats and Republicans, of all races, regularly owe their election to minority support. Even separatists of the past, such as Dixiecrat politicians Strom Thurmond and George Wallace, have sought minority support out of political necessity and thus have been forced to address the concerns of *all* constituents, regardless of race. *Id.* at 234, 241. Such coalitions exemplify the American political tradition.

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. The Court has held that racial gerrymandering "reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 125 L. Ed. 2d at 529. In fact, "[b]y perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.* Recently, Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms

of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 129 L. Ed. 2d at 712 (Thomas, J., concurring).

Thus, the current interpretation of the Voting Rights Act unconstitutionally requires the creation of racially proportional legislative districts. Originally, the intent of the Act was to ensure nondiscriminatory access to the ballot, *i.e.*, prohibiting literacy tests and other discriminatory prerequisites for voting. *See Allen v. State Board of Elections*, 393 U.S. at 582-94 (Harlan, J., dissenting). As such, it was a valid exercise of the Fifteenth Amendment's remedial powers and was "constitutionally valid as interpreted and as applied." *Shaw*, 125 L. Ed. 2d at 533. But "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'" *Miller*, 63 U.S.L.W. at 4733 (internal citation omitted). The Voting Rights Act is not an all-purpose weapon to be used by social engineers in the pursuit of their concept of utopia. *See Presley v. Etowah County Commission*, 502 U.S. 491, 509 (1992); *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting). The Voting Rights Act is, always has been, and always will be a statute that must square with the dictates of the Constitution. Because the executive and legislative branches of the federal and state governments interpret and apply the Act and case law involving the Act so as to require the creation of racially proportional districts, this Court must reevaluate the Act to assure either an interpretation which does not violate the Constitution or to invalidate the Act itself, if it cannot be construed to avoid unconstitutional applications.

II

RACIAL GERRYMANDERING IS NEVER CONSTITUTIONAL

Whatever may be the justification for racial classifications in other situations (*e.g.*, "affirmative action" in contracting and employment), the Fourteenth Amendment forbids government institutions from redistricting based on race and ethnicity. To put it in the familiar nomenclature of the Court, racial gerrymandering can never survive strict scrutiny because there is no compelling justification for redistricting on racial lines.

The Fourteenth Amendment to our Constitution embodies the fundamental principle of "moral equality." Moral equality requires that government and society consider every person as an individual, not as a fungible member of some racial or ethnic group. Moral equality forbids government from handicapping individuals for arbitrary or discriminatory reasons. It has been alternatively described as "equality of opportunity," especially when contrasted with numerical equality, or "equality of results." T. Eastland and W. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* 9-10 (Basic Books, Inc., N.Y., 1979) (Eastland); *see also* T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles* 121-40 (William Morrow & Co., N.Y., 1987).

America was founded on the basis of moral equality, as it is so eloquently phrased in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The institution of slavery existed at the time of the Declaration and was hopelessly inconsistent with it. For nearly a century, this incompatibility provoked bitter political debate, culminating with Abraham Lincoln declaring an end to slavery in 1863

and the triumph of the Union in 1865. The Fourteenth Amendment enshrined the victorious concept of moral equality after the Civil War and this concept was still the norm through the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Only within the last 25 years has devotion to numerical equality threatened to subsume moral equality as the basis for American politics.

A. Historical Basis for Moral Equality

Moral equality was central to the philosophical principles which inspired the founding of the American republic. In John Locke's Second Treatise, the philosopher argued that "all men are naturally in ... a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." J. Locke, *Two Treatises of Government* 121 (T. Cook ed., 1947), *cited in* H. Jaffa, *How to Think About the American Revolution: A Bicentennial Celebration* 40 (Durham, N.C., 1978) (Jaffa). This concept of natural freedom and equality provided that the just powers of government in the American political tradition could only be derived from the consent of the governed. Because the right of consent is itself derived from the equality of all humans, consent is limited--one may not consent to that which denies the premise of equality. Jaffa at 40-42; *see also The Federalist No. 51* (J. Madison) (Rossiter ed., 1961) at 322. A government of men over men, rather than of angels over men, or of men over beasts, presumes the moral equality of the men who govern, not only among themselves but also with the governed. Thus, the very nature of the problem that the Constitution was written to resolve is determined by the meaning of equality. Jaffa at 42.

British political scientist Joel Barlow wrote in 1792 that the American notion of moral equality precipitated the Revolution and sustained American freedom. In the United

States, the word "people" meant the whole community and comprehended every human being in the society. There were only "individuals" in America; there could be nothing else--no feudal system, no lords, no monarchs. Rather, Americans revered only those distinctions which nature created--a diversity of talents, abilities, and virtues. J. Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety of a General Revolution in the Principles of Government* 17 (Ithaca, N.Y., 1956, first published London, 1792), *cited in* G. Wood, *Creation of the American Republic, 1776-1789* 607 (University of North Carolina Press, 1969). The obvious conflict between moral equality and the institution of slavery was not fully resolved in American political and legal thought until Abraham Lincoln freed all slaves with the Emancipation Proclamation on January 1, 1863, *reprinted in* H. Commager, *Documents of American History*, Vol. 1, 420-21 (9th ed. 1973) (Commager), and the states ratified the Thirteenth Amendment to the United States Constitution on December 6, 1865.

Lincoln's importance to the development of the concept of moral equality cannot be underestimated. To him, the principle of equality was logically necessary to the idea of self-government. *Lincoln's First Inaugural Address* (March 4, 1861), *reprinted in* Commager at 386-88. Self-government, by definition, requires the assumption that all humans possess free will and that all are morally autonomous. In this sense, all individuals are created equal and for one person to deal with another, because of race, in ways that deny or diminish the other's intrinsic worth as a moral agent is to deny the very basis upon which self-government is possible. Eastland at 55-56.

In his message to Congress on July 4, 1861, Lincoln defined the cause of the Union as the preservation of "that form, and substance of government, whose leading object is, to elevate men--to lift artificial weights from all shoulders--to

clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life." 4 *The Collected Works of Abraham Lincoln* 438 (R. Basler ed., 1953), *cited in* Jaffa at 34. Thus, republican government, in Lincoln's view, necessitated the elimination of slavery because it was incompatible with the principle of moral equality. Lincoln believed that this principle was higher than any other: It defined republican government. Eastland at 47.

The passage of the Civil War Amendments in 1865-1870 highlighted the primacy of moral equality. These Amendments spoke only of individuals, not groups: "[E]quality is an individual attribute that had no connection with class or race; the [Fourteenth] [A]mendment extended the same rights to all--there could be no need to mention race or colour. ... Equality could not be divided into sections as happened to suit the demands of one or another class or interest group at any particular time." Pole at 180-81. This moral equality of the individual, espoused by President Lincoln, led to the judicial concept of a color-blind Constitution:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Sadly, the moral equality and constitutional

protection of the individual under a color-blind Constitution was corrupted by the doctrine of "separate but equal," an invidious concept that haunted America for more than a half-century.

On May 17, 1954, the Court once and for all declared "that all men are created equal," and that our Constitution would stand for nothing less. "Separate" is "inherently unequal." *Brown v. Board of Education*, 347 U.S. at 495. The Court's opinion would provide the legal foundation for Dr. Martin Luther King's "dream"--that his children would "live in a nation where they will not be judged by the color of their skin but by the content of their character." A. Kull, *A Color Blind Constitution* 166 (Harvard University Press, 1992). Moral equality, fundamental democratic principles, and the Constitution were restored as the supreme law of the land.

How, then, have states been not only allowed but *required* to segregate congressional districts? Some general observations can be accurately made: The pursuit of numerical, rather than moral, equality unfortunately has been embraced by virtually all institutions of government and some public opinion. *See* Bickel at 133. The most disturbing aspect of this shift in political thought is the disavowal of individual rights in favor of a collective group rights concept of equality. All blacks are held to be victims of discrimination and hence entitled to compensation. All whites are held to have benefited unjustly from the system of racial discrimination and are guilty. These assumptions stand in fundamental opposition to the universal principle of individual rights that has been the moral and intellectual foundation of the American republic. *See* H. Belz, *Equal Protection and Affirmative Action, The Bill of Rights in Modern America* 173 (Bodenhamer & Ely, eds., Indiana University Press, 1993) (Belz).

B. Racial G rrymandering Violates Brown and the Concept of Moral Equality

By allowing states to racially gerrymander their electoral districts, the despicable doctrine of "separate but equal," under the guise of "separate but better off," *Wright*, 376 U.S. at 62 (Douglas, J., dissenting), or "separate but proportional," Belz at 162, is restored under the sanction of law. In 1964, Justice Douglas asserted that there could be no legal distinction between segregation in voting and segregation elsewhere.

> I had assumed that since *Brown v. Board of Education* ... no State may segregate people by race *in the public areas*. The design of voting districts involves one important *public area*--as important as schools, parks, and courtrooms. We should uproot all vestiges of *Plessy v. Ferguson* ... from *the public area*. ... "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 62, 67 (1964) (Douglas, J., dissenting) (internal citations omitted); *see also Miller*, 63 U.S.L.W. at 4729. The late Professor Bickel believed that *Brown* and its progeny foreclosed official racial segregation and discrimination, for now and forever: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." Bickel at 133. To allow states to be anything but race-neutral in the drawing of electoral districts is to deny moral equality and repudiate *Brown*.

First, racial segregation in redistricting is a per se violation of the Fourteenth and Fifteenth Amendments to the

Constitution. The Fifteenth Amendment is an "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 217-18 (1876). There are no codicils or clauses in this Amendment with respect to a particular race--it is wholly color-blind and forbids *all* discrimination in voting, not merely discrimination that social engineers anoint as "invidious." Similarly, the Fourteenth Amendment forbids racial discrimination in regards to democratic elections: "Its central mandate is racial neutrality in governmental decisionmaking." *Miller*, 63 U.S.L.W. at 4727. In *Wright*, Justice Goldberg faithfully united the moral equality of *Brown*, the Fourteenth Amendment, and the harm of racial gerrymandering: "Given this settled principle that state-sanctioned racial segregation is unconstitutional per se," he wrote, "the Court's decisions since Brown v Board of Education [have held] that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation. The Fourteenth Amendment commands equality, and racial segregation by law is inequality." *Wright*, 376 U.S. at 69 (Goldberg, J., dissenting). Although racial discrimination unrelated to elections (*i.e.*, "affirmative action") has been allowed by this Court to stand in the past, "[o]ur Constitution has a special thrust when it comes to voting," as emphasized by the Fifteenth Amendment. *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971) (Douglas, J., dissenting in part and concurring in part). Racial gerrymandering cannot be justified in light of the dictates of the Fourteenth and Fifteenth Amendments and the moral equality of *Brown*.

Second, segregating individuals by skin color into racial districts is tantamount to the despicable institution of apartheid in South Africa and the caste system of India: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who

may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw,* 125 L. Ed. 2d at 529; *see also Holder,* 129 L. Ed. 2d at 710-11 (Thomas, J., concurring in the judgment). The analogy to apartheid and caste systems is not novel: Three decades ago Justice Douglas argued that redistricting by racial segregation "is comparable to the Electoral Register System which Britain introduced into India." *Wright,* 376 U.S. at 63 (Douglas, J., dissenting). In that political caste system, "[n]o one who is not a Sikh, a Muhammadan, Anglo Indian, European or an Indian Christian, is entitled to be included in a Sikh, Muhammadan, Anglo Indian, European or an Indian Christian constituency respectively." *Id.* at 63 n.5. This system was allegedly justifiable because, *inter alia,* "Muslims are a distinct community with additional interests of their own, which are not shared by other communities." *Id.* at 63. This sounds remarkably similar to the current justification for racial gerrymandering in America. A caste system might allow racial clans to be organized into a tribal federation, but it can never result in an indivisible nation of independent and free-thinking men and women. Thernstrom at 132.

But "[t]here is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting). By permitting racial segregation in redistricting, we "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena,* 132 L. Ed. 2d at 190 (Scalia, J., concurring in part and concurring in the judgment); *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 187 (1977) (Burger, C.J., dissenting) (noting the retreat from the ideal of the American "melting pot"). Further, the cost of allowing political apartheid in

our system of representative government is not academic or idle:

> There is much reason to fear the harm that it is currently doing to its supposed beneficiaries, and still more reason to fear the long-run consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences. Already there are signs of hate organizations growing in parts of the country and among more educated social classes than ever took them seriously before. As a distinguished writer has said in a different context: "It takes a match to start a fire but the match alone is not enough." Many racial policies continually add to the pile of combustible material, which only needs the right political arsonist to set it off.

T. Sowell, *Civil Rights: Rhetoric or Reality*? 117-18 (1984) (Sowell) (emphasis omitted). In light of the "ethnic cleansing" occurring in Bosnia, Rwanda, and elsewhere, and America's own tragic history of race hate, race subjugation, and race slavery, the Court should be particularly wary of acquiescing to separatist policies and disregarding the tragic potential of political segregation by saying "it could never happen here."

Finally, there is no legal justification for racial segregation in redistricting, *i.e.*, there is no compelling state interest that would allow this racial classification to survive strict scrutiny. The only possible remedy when a governmental entity racially gerrymanders is to replace it with a race-neutral districting scheme. *United Jewish Organizations*, 430 U.S. at 186 (Burger, C.J., dissenting) (internal citation omitted). Only one governmental interest can maintain racial classifications under strict scrutiny: remedying the present effects of identified past illegal discrimination by a particular government entity. *See*

Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986); *Richmond v. J.A. Croson Co.*, 488 U.S. at 524 (Scalia, J., concurring in the judgment); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) This "remedy rationale" might be appropriate in the context of governmental hiring and contracting: A minority *individual* may have been denied the opportunity to compete for government employment or contracts because of his or her race and, by giving that *individual* a preference in the hiring/contracting process, an employer compensates that *individual* for a past opportunity denied.

This rationale, however, cannot square with the conditions of voting and redistricting. There are no residual losses from "bad" elections and redistricting schemes of the past: Each time a governmental entity redistricts its jurisdiction, the slate is cleaned. The fact that a previous group of legislators invidiously gerrymandered by race after a previous census has absolutely nothing to do with the present redistricting process--either the new plan is race-neutral and must be deferred to, or it segregates individuals by race and must be struck down as unconstitutional. There simply is no grey area in redistricting. By creating "majority-minority districts," or "minority influence districts," or any other form of "racial borough," "[n]o old injustice is undone, but a new injustice is inflicted." R. Bork, *The Tempting of America* 106 (The Free Press, 1990); *see also* Sowell at 119. The only constitutional response to racial gerrymandering is to strike it down emphatically and require race-neutral redistricting in its place.

"[G]overnment has no business designing electoral districts along racial or religious lines." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting). Racial gerrymandering, whether "benign" or "invidious," "threatens to carry us further from the goal of a political system in which race no

longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 125 L. Ed. 2d at 535. This Court should strike down the racial gerrymandering scheme at issue in this case and establish that, in the context of legislative redistricting, our Constitution is truly color-blind.

CONCLUSION

"The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy*, 163 U.S. at 560-61 (Harlan, J., dissenting). Justice Harlan's words, founded on the Fourteenth Amendment and given legal credence by *Brown v. Board of Education*, required the end of segregation in buses, in schools, and in districting. The Court should uphold the legacy of truth in Justice Harlan's dissent and the moral equality which forms the basis for the American political tradition by reversing the decision of the court below.

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Respectfully submitted,

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